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In Reply Refer to:

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P.O. Box 1343
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In re: **New NCE-FM, Chickasha, OK**
Facility ID No. 173102
File No. BPED-20071019AIW

Petition to Deny

Dear Counsel and Mr. Christy:

This letter concerns the referenced application (the "Application") of South Central Oklahoma Christian Broadcasting, Inc. ("SCOCBI") for a new noncommercial educational ("NCE") FM station in Chickasha, Oklahoma. On July 17, 2008, Norman Unitarian Universalist Fellowship ("Norman") filed a timely Petition to Deny the Application (the "Petition").¹ For the reasons set forth below, we grant the Petition in part and refer this mutually exclusive application group to the full Commission for a point system determination.

Background. The Application is part of NCE MX Group 202 that would serve different communities in Oklahoma. Edwards Broadcasting ("Edwards") proposed to serve Alex, Oklahoma. Norman proposed to serve Dibble, Oklahoma. SCOCBI proposed to serve Chickasha, Oklahoma. In such situations, the Commission is required to make a threshold determination, pursuant to the Communications Act of 1934, as amended (the "Act"), as to whether grant of any of the applications would further the fair, efficient, and equitable distribution of radio service among communities.² Only SCOCBI asserted that it is eligible for a fair distribution preference. Accordingly, Edwards and Norman were eliminated, and SCOCBI was named the tentative selectee in NCE MX Group 202.³

¹ Although the Certificate of Service attached to the Petition indicates that both SCOCBI and its counsel were served, SCOCBI did not oppose the Petition. On July 17, 2008, Norman also filed an "Erratum" to its Petition to include an inadvertently omitted "Affirmation" of Michael D. Brown of Brown Broadcast Services, Inc.

² See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

³ See *Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Rcd 10213, 10219 (2008).

An NCE FM applicant is eligible to receive a Section 307(b) fair distribution preference if it would provide a first or second NCE aural service (in the aggregate) to at least ten percent of the population, provided that this constitutes at least 2,000 people, within the proposed station's 60 dBu contour.⁴ If more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.⁵ An applicant will receive a dispositive fair distribution preference by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service population total.⁶ If no applicant is entitled to a first service preference, we will consider combined first and second service population totals and apply the same 5,000-listener threshold.

As noted above, in NCE MX Group 202, only SCOCBI claimed that it is eligible for a fair distribution preference. In addition, only SCOCBI asserted that it was entitled to a combined first and second service preference. Based on SCOCBI's submissions and calculations,⁷ it appeared to qualify for a dispositive combined first and second NCE-service preference. Accordingly, pursuant to Section 73.7004 of the Commission's Rules (the "Rules"),⁸ we identified SCOCBI as the tentative selectee in NCE MX Group 202.⁹ On June 30, 2008, the staff accepted the Application for filing and established a 30-day period for filing petitions to deny.¹⁰ On July 17, 2008, Norman timely filed its Petition.

Discussion. Pursuant to the Act, petitions to deny must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a).¹¹ We find that Norman presents specific factual allegations sufficient to meet this standard.

⁴ See 47 C.F.R. § 73.7002(b). With respect to population information, applicants were to use the 2000 Census data, if available by June 4, 2001. See *Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001*, Public Notice, 16 FCC Rcd 6893 (MB rel. Mar. 22, 2001). Applicants were also to base their "fair distribution" analysis on the "snap shot" date of June 4, 2001, which is applicable unless the applicant subsequently makes engineering changes that would diminish its comparative position. *Id.*

⁵ See 47 C.F.R. § 73.7002(b). See also *Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001*, Public Notice, 16 FCC Rcd 10892, 10893 (MB rel. May 24, 2001).

⁶ *Id.*

⁷ SCOCBI's 60 dBu contour encompasses 17,957 people. SCOCBI's claimed aggregated first and second NCE service is 17,214 people. See SCOCBI's Application, Questions III(1), III(2), and associated exhibits. Thus, it claimed that it would provide combined first and second NCE service to ten percent of the population within its 60 dBu contour and to more than 2,000 people.

⁸ 47 C.F.R. § 73.7004.

⁹ See n.3, *supra*.

¹⁰ See *id.*

¹¹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

In its Petition, Norman challenges SCOCBI's Section 307(b) fair distribution claim, arguing that SCOCBI's analysis omits the contour of unbuilt NCE station KFXU(FM) at Chickasha.¹² Specifically, Norman attaches to its Petition an Engineering Statement prepared by Brown Broadcast Services, Inc.,¹³ which states, in part:

The SCOC[BI] contour is almost completely encompassed by the contour of KMSI (LIC), Moore, OK – located to the northeast, and is partly overlapped by the contour of KJRF (LIC), Lawton, OK – located to the southwest. The SCOC[BI] contour is also largely overlapped by the original CP of KFXU, Chickasha, OK. . . . SCOC[BI] neglected to include the KFXU CP in their [sic] Fair Distribution calculations, and therein lies the difference in results.¹⁴

Norman argues that SCOCBI's failure to analyze the overlapping contour of KFXU(FM) is fatal to its claim for a fair distribution preference under Section 307(b). We agree. On August 7, 2007, the Media Bureau released a Public Notice specifically requiring that NCE applicants include the construction permits of unbuilt FM stations when calculating whether they are entitled to a preference under Section 307(b) of the Act.¹⁵ Our engineering staff's analysis verifies that SCOCBI failed to account for unbuilt NCE station KFXU(FM) in its fair distribution analysis. In addition, the engineering staff analysis supports Norman's claim that SCOCBI provides a second aural NCE service to only 55 people or 0.3 percent of the population within the station's 60 dBu service contour. To be entitled to a fair distribution preference under Section 307(b), an applicant must provide first or second NCE service to at least 2,000 people and ten percent of the population within the station's 60 dBu service contour.¹⁶ Therefore, SCOCBI was not entitled to a fair distribution preference, and all applications in NCE MX Group 202 are comparable in this regard. Accordingly, we rescind SCOCBI's tentative selectee status.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the Petition to Deny filed by Norman Unitarian Universalist Fellowship on July 17, 2008, IS GRANTED in part and IS DENIED in all other respects.

¹² Petition at 1, 2.

¹³ See Petition at Exhibit 2.

¹⁴ Petition at 2; *see also id.*

¹⁵ See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window: Limited Filing Freeze to Commence September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15052 (MB rel. Aug. 7, 2007) ("NCE first and second services calculations must include outstanding permits for unbuilt NCE FM stations."); *see also Baker v. FCC*, 834 F.2d 181 (D.C. Cir. 1987) (only granted construction permits considered in Section 307(b) comparative analyses).

¹⁶ See 47 C.F.R. § 73.7002(b).

IT IS FURTHER ORDERED that the tentative selectee status awarded the application filed by South Central Oklahoma Christian Broadcasting, Inc. (File No. BNEP-20071019AIW) for a new NCE station at Chickasha, Oklahoma, IS RESCINDED.

The staff will refer NCE MX Group 202 to the full Commission for a point determination.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Michael Couzens, Esq.